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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

TRANSPAC DRILLING VENTURE, 1983-63 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-2 BY JAMES M. DOBBINS, AND TRANSPAC DRILLING VENTURE, 1983-4 BY BRYAN D. BURR,
PETITIONERS,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arthur H. Boelter
Counsel of Record
BOELTER & GALE
1001 Fourth Avenue #4111
Seattle, WA 98154-1121
(206) 587-0000

72pp

1. Whether 26 U.S.C. §6231(a)(7) applies in proceedings under the Tax Equity and Fiscal Responsibility Act of 1982 after the Final Partnership Administrative Adjustment has been issued to a partnership - the judicial phase of the partnership proceeding.

2. Whether a party can ratify by implication a petition filed under the partnership rules of the Tax Equity and Fiscal Responsibility Act of 1982 which petition is filed by a non-Tax Matters Partner during the initial 90 day period following issuance of the Final Partnership Administrative Adjustments.

Parties to Proceeding:

The names of all parties to this proceeding, not listed in the caption, are: Ivar and Tennie Anderson, Jeanne S. Anderson, Gila Burr, Guile Dobbins, James M. Dobbins, Jr., and Margorie Dobbins. None of these parties have any parent companies or subsidiaries which are not wholly owned.

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PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners respectfully pray for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this matter on February 8, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (No. 93-5045) (App., *infra*, A1-A31) is reported at 16 F.3d 383. The opinion of the United States Claims Court[1] (90-116T, 90-123T, 90-124T and 90-130T) (App., *infra*, A32-A52) is reported at 26 Cl.Ct. 1245.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on February 8, 1994. This petition was timely filed in accordance with SUP. CT. R. 13 and is authorized by 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. 6231:

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[1] The United States Claims Court is now known as the United States Court of Federal Claims.

(a) DEFINITIONS.--For purposes of this subchapter--

(7) TAX MATTERS PARTNER--The tax matters

partner of any partnership is--

(A) the general partner designated as the tax matters partner as provided in the regulations, or

(B) if there is not general partner who has been so designated, the general partner having the largest profits interest in the partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 partner of such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary

determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters partner.

The texts of the following statutes and regulations relevant to the determination of the present case are set forth in the Appendix at A53-A77: Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. §§6221-6231; Temp. Reg. §301.6224(a)-1T; Temp. Reg. §301.6231(a)(7)-1T.

STATEMENT OF THE CASE

I. JURISDICTION OF THE LOWER COURTS.

In response to a Notice of Final Partnership Administrative Adjustment ("FPAA") issued by the Commissioner of Internal Revenue, each Petitioner filed a timely petition for readjustment as Tax Matters Partner ("TMP") of their respective partnerships in accordance

with 26 U.S.C. §6226 ("code" or "IRC") as authorized by 28 U.S.C. §1508. Petitioners timely appealed from the judgment of the Court of Federal Claims under 28 U.S.C. §1295(a)(3) as authorized by IRC §6226(g) and (h).

II. STATEMENT OF FACTS

Transpac Drilling Venture 1983-1, 1983-2, 1983-4 and 1983-63 (hereinafter TDV 1983-1, TDV 1983-2, TDV 1983-4 AND TDV 1983-63) are limited partnerships organized under the laws of Delaware. They were formed as part of the Transpac Drilling Venture Program. (App. *infra* at A5-A6).

The partnerships were formed with two general partners, Douglas C. Adams ("Adams") and Churchill Oil and Gas Corporation ("Churchill"). Adams became the TMP of TDV 1983-1, 1983-2, 1983-4 and 1983-63 at some time prior to and continued to be such until his January

30, 1990 resignation, unless his designation as TMP was terminated for some other reason. (App., *infra* at A5). On or about September 4, 1987, Adams agreed to plead guilty to charges of conspiracy and aiding and abetting fraud by an investment counselor arising from his actions in connection with the Transpac Drilling Venture Program. As part of his agreement, Adams was required to file amended income tax returns for 1983 and 1984 removing all items attributable to Transpac. (App., *infra* at A6-A7). Churchill, a Texas corporation, forfeited its corporate charter in 1984. (App. *infra* at A5-A6).

Crestwood Hospitals, Inc. ("Crestwood"), Bryan Burr ("Burr") and James M. Dobbins ("Dobbins") were limited partners in one or more of TDV 1983-1, 1983-2, 1983-4 and TDV 1983-63 during the taxable years 1983 and 1984. (App. *infra*

at A7).

The Internal Revenue Service ("IRS") conducted a partnership level examination of TDV 1983-1, 1983-2, 1983-4 and 1983-63's partnership returns of income (Form 1065) filed for taxable years 1983 and 1984. At the conclusion of the examination, the IRS issued a FPAA to each of the partnerships. The FPAA was mailed to Adams as TMP of TDV 1983-63 on November 7, 1989, for TDV 1983-1 and TDV 1983-2 on November 9, 1989, and for TDV 1983-4 on November 17, 1989. Copies of the FPAAs were subsequently sent to the limited partners in the partnerships including Crestwood, Burr and Dobbins. (App. *infra* at A7, A34-A35). Petitions for readjustment were filed in the U.S. Claims Court by Crestwood, Burr and Dobbins ("Petitioners") within the 90 days following the mailing of the FPAAs to Adams as TMP. Concurrent with the

filing, Petitioners made the required deposit with the IRS for the taxable years 1983 and 1984 for their respective partnerships. (App. *infra* at A11-A12, A37).

On February 12, 1990, Adams signed several documents each entitled "Resignation of Tax Matters Partner and Appointment of New Tax Matters Partner." Those documents state that Adams was resigning as TMP for each of the partnerships and appointed each of the Petitioners as TMP for the respective partnerships. The documents stated that Petitioners agreed to become general partners of the partnerships for the limited purpose of becoming the TMP. These documents were signed by Petitioners on April 9, 1990. (App. *infra* at A11-A12). In addition to these documents, Petitioners attempted to contact the other limited partners in the

partnership and get their approval on the filing of the petitions. (App. *infra* at A23-25).

The Court of Federal Claims held that Petitioners were unable to be the TMPs of the partnerships because they were not general partners in their respective partnerships under IRC §6231(a)(7). (App. *infra* at A40-A47). They further held that the court did not have the power to appoint Petitioners as the TMPs finding that §6231(a)(7) applies during the judicial stage as well as the administrative stage of the proceedings under IRC §§6221-6233. (App. *infra* at A48-A49). Finally, they found that neither the partnerships nor Adams were able to ratify the petitions because Petitioners did not meet the deposit requirement of IRC §6226(e)(1). (App. *infra* at A50-A51).

The Court of Appeals for the Federal

Circuit affirmed the holding of the Court of Federal Claims finding that Petitioners were not general partners of the partnership. (App. *infra* at A18-A20). They agreed with the lower court in finding that §6231(a)(7) applied during the judicial phase of a TEFRA proceeding as well as the administrative stage. (App. *infra* at A20-A22). The court of appeals further found that there could be no post-filing ratifications of the petitions filed in this matter because the court must have jurisdiction over the case at the time the petition is filed. (App. *infra* at A23-A29). Finally, the appellate court found that Petitioners due process rights were not violated in this case. (App. *infra* at A29-A31).

REASONS FOR GRANTING THE PETITION

This is a case of first impression

where this Court must decide primarily two questions. First, whether or not IRC §6231(a)(7) and the regulations promulgated thereunder apply to the judicial stage of a TEFRA proceeding. The Tax Court has ruled that §6231(a)(7) does not apply; however, the Court of Federal Claims and the Court of Appeals for the Federal Circuit have ruled that it does apply. Second, whether or not a party can ratify by implication a petition under TEFRA which petition is filed by a non-TMP during the initial 90 day period following issuance of the FPAA. Once again, the Tax Court has ruled that implied ratification applies to TEFRA proceedings and the Court of Federal Claims and the Court of Appeals for the Federal Circuit have said that it does not apply.

ARGUMENT

I. PRELIMINARY STATEMENT.

Prior to 1982, IRS audits of partnerships and subchapter S corporations were conducted on an individual level. With the passage of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) these audits were conducted on an entity level. The TEFRA rules, with respect to partnerships, applied to virtually all partnerships which were required to file tax returns under IRC §6031(a) whose tax years began after September 3, 1982. IRC §§6221, 6231(a)(1).

The rules under TEFRA are codified in Subchapter C of Chapter 63 of the Code at §§6221-6233. In general these sections provide for an audit to be conducted at the partnership level with special forms of notification to various partners. At

the conclusion of the audit a notice of adjustment, the FPAA, like the normal statutory notice of deficiency is sent to the partners. Thereafter, the partners may seek judicial review of the adjustments determined by the IRS.

The main problem in this case results from the interplay between IRC §§6226 and 6231(a)(7). Once the FPAA is mailed to the TMP, IRC §6226 governs judicial reviews of the proposed adjustments. It states a system of priorities in terms of the various forums and the time and manner of access to those forums. Under IRC §6226(a) only the TMP may file a petition within the first 90 days after the FPAA is issued. Once this time expires, certain other partners may file a petition within the next 60 days. IRC §6226(b)(1). During this 60 day period, however, any petition filed in the Tax Court has priority over all other

petitions and those other petitions must be dismissed. IRC §6226(b)(2). The effect of this is that if a partner with a 70 percent interest files in the Court of Federal Claims on the 91st day and a partner with a 1 percent interest files in the Tax Court on the 149th day, the petition in the Court of Federal Claims must be dismissed. As such, a partner with little interest in the partnership or the proceeding can control the litigation.

Because of this, the determination of the partnership's TMP is of vital importance. IRC §6231(a)(7) defines a TMP. There are statutory limitations found in IRC §6231(a)(7) requiring the TMP to be a general partner in the partnership or if no general partner is designated or otherwise qualified then the Secretary may choose from among the limited partners. The issue is whether

the application of this provision and the regulations thereunder should be limited to the administrative phase of a TEFRA proceeding. Several Tax Court cases (*see infra*) and the Tax Court Rules (Tax Court Rule 250) have held that it should.

In the present instance it is arguable that the partnerships, TDV 1983-1, 1983-2, 1983-4 and 1983-63 were, at the time the FPAAs were issued without a general partner. In the proceedings below the Petitioner argued that the corporate general partner (Churchill) was ineligible as its corporate charter had been revoked, *see* Temp. Regs. §§301.6231(a)(7)-1T(f)(1)(i) and -1T(l)(3), and that the individual general partner (Adams) was also ineligible on the grounds that he was under criminal investigation in 1986 and therefore disqualified under Temp. Regs. §§301.6231(a)(7)-1T(l)(4) and -

1T(f)(1)(iii), or he was disqualified under organic partnership law of Delaware (DEL. CODE ANN. tit. 6 §1521) in that both his actions in the organization of the partnerships and his cooperation as a government witness would have violated his fiduciary duty to the partnerships. *Cf. Sherman v. U.S.*, 356 U.S. 369 (1958).

For purposes of this petition and the arguments herein whether Adams or even Churchill were disqualified is irrelevant. If IRC §6231(a)(7) applies after the FPAA is issued in the TEFRA proceeding (the judicial stage) then even assuming arguendo Petitioners here were general partners the petitions should be dismissed for lack of jurisdiction under IRC §6231(a)(7) and the regulations thereunder. This is so of course because Adams designation of the Petitioners was not in accordance with the statute and regulations. Furthermore, under the

logic of the courts below even if Adams had designated Churchill (and Churchill were still a valid corporation) the petitions to the Court of Federal Claims would have been invalid.

II. IRC §6231(a)(7) AND THE REGULATIONS PROMULGATED THEREUNDER SHOULD BE HELD TO APPLY ONLY DURING THE AUDIT PROCEEDINGS ALLOWING A PARTNERSHIP TO APPOINT A LIMITED PARTNER AS THE TMP FOR JUDICIAL PROCEEDINGS.

A review of IRC §§6221-6233 clearly reveals that a TEFRA proceeding has two distinct stages, an administrative stage followed by a judicial stage. The rights and responsibilities of a TMP as to the other partners in the partnership varies greatly between the two stages.

A. The TEFRA Organizational Structure And The TMP's Changing Role Throughout The Various Stages Therein.

1. Administrative Stage

The administrative stage is broken down in the following steps: 1) issuance of the Notice of Beginning of Administrative Proceedings by the IRS ("NBAP"); 2) an audit conducted by the IRS Revenue Agent; 3) the sixty (60) day letter issued at the conclusion of the audit; 4) a conference with IRS Appeals; 5) administrative settlement (if any); and 6) the issuance of the FPAA. IRC §§6221-6233. During most of this stage, it is generally the TMP who has had primary, if not exclusive, contact with the IRS; however, every partner has the right to participate in any phase of these proceedings. IRC §6224(a); Temp. Reg. §301.6224(a)-1T. Due to this ability to participate, the partners need

not abrogate their rights to the TMP.

Although the partners participation may be limited prior to the issuance of the sixty (60) day letter, at the Appeals Conference, these partners can obtain an opportunity to engage in substantive negotiations with the IRS. The Appeals Division will grant separate conferences (in different cities if need be) for all partners who wish a conference. IRM 8113(630), Appeals TEFRA Handbook. Under §6224(c)(3), a TMP can bind only non-notice partners in most partnerships to an administrative settlement. Accordingly, the TMP's authority to bind the partnership to settlement at the administrative level is extremely limited. Therefore, the partners can largely control their own destiny as it relates to any proposed adjustments during the administrative stage of the TEFRA proceeding.

Once an FPAA is mailed the administrative stage of the TEFRA proceeding ends and the judicial phase begins since in order to avoid having the proposed adjustments become final, one of the partners must begin an action in court.

2. Judicial Stage.

Section 6226 governs judicial review of the proposed adjustments set forth in the FPAA. As discussed previously, section 6226 sets up a priority scheme for the filing of petitions based on the FPAA. Given this priority scheme the role of the TMP assumes central importance. The TMP controls the choice of forum for the first ninety (90) days after the FPAA has been mailed to the TMP. If the TMP fails to file within this time period, adverse consequences may befall the partnership. For

instance, one notice partner, possibly even a one percent, incompetent and indifferent notice partner could force litigation in the Tax Court, even if all, or a large percentage of the notice partners desired to file in another forum. Accordingly, to ensure that the partnership is able to file in the forum which will best serve the partnership, it is necessary that the partnership have a designated TMP who best understands and represents the partnership's interest.

The importance of the TMP during the judicial stage is further shown by the fact that the TMP may intervene in the judicial action started by another partner during the sixty (60) days following the initial ninety (90) day period reserved for the TMP to file. IRC §6226(b)(5). This intervention allows the TMP to participate in the litigation.

The TMP's role during the judicial

stage is further magnified in the Tax Court because the rules of the Tax Court give the TMP greater rights and responsibilities than those given statutorily. Tax Court Rule 248(a) authorizes the TMP to settle for all the partners by executing a settlement agreement which certifies that no party objects to entry of the decision. As Rule 248(a) allows the TMP to bind all notice partners and five percent (5%) groups, the TMP's authority during the judicial stage is much greater than in the administrative stage.

The importance of the TMP and the nonapplicability of §6231(a)(7) and Temp. Reg. §301.6231(a)(7)-1T during the judicial stage can be seen by the Tax Court's ruling in *Computer Programs Lambda v. Commissioner*, 90 T.C. 1124 (1988)("*Computer Programs II*"), where the court using its inherent powers appointed

a limited partner to be the TMP of the partnership since no general partner could act as the TMP. *See also Computer Programs Lambda v. Commissioner*, 89 T.C. 198 (1987)("*Computer Programs I*") and *September Partners, Ltd. v. Commissioner*, 58 T.C.M. (CCH) 1244 (1990)(In each of these cases the court asked the limited partners to select a TMP for the partnership). This right is codified in Tax Court Rule 250. Nowhere in the statute is the Tax Court or any court given this power. Such a power can exist only if §6231(a)(7) and the regulations promulgated thereunder, do not apply during the judicial stage. This position is supported in *Chomp Associates v. Commissioner*, 91 T.C. 1069 (1988) where the court held that the "obvious purpose" of the Secretary's regulations under §6231 is to give the IRS "the name and an address of the TMP to be able to properly

mail a FPAA." *Chomp Associates, supra* at 1078.

B. The Rights And Duties Of The TMP During The Judicial Stage Of The TEFRA Proceedings Dictate That A Partnership Should Not Be Bound By The Requirements Of IRC §6231(a)(7) For Designating A TMP After The Receipt Of An FPAA.

As shown above the rights and responsibilities of the TMP to the other partners varies significantly depending on the stage of the TEFRA proceedings. During the administrative stage the partnership is dealing solely with the IRS. During this time, the IRS uses the TMP as a contact for the partnership, as well as an informant. During this stage, any partner has the right to participate to the same extent as the TMP in the following ways: first) any partner or five percent (5%) group can receive any notice the IRS mails to the TMP, Temp. Reg. §301.6223(b)-1T(a); second) any

partner may furnish information to the IRS, *Id.*; third) any partner may participate in any phase of the administrative proceeding, including attending any meeting between the IRS and the TMP, IRC §6224(a); Temp. Reg. 301.6224(a)-1T; and most importantly, fourth) any partner may file an administrative appeal and obtain a settlement with the IRS prior to the judicial phase. *See* IRC §6224(c). In addition, during the administrative phase, the TMP has only a very limited right to enter into an administrative settlement that is binding on the other partners. Temp. Reg. §301.6223(c)-1T(c).

Once the judicial phase begins, at the mailing of the FPAA, the TMP assumes a more critical role and has rights and responsibilities which are not available to the other partners. For example, the TMP has the exclusive right to determine

the forum in which the partnership will litigate the Government's position as set forth in the FPAA. IRC §6226. This right is no small matter. There are decided differences in the three courts available under §6226. Of these three, the Tax Court is the least favorable for this type of litigation. For this reason, it is understandable that the IRS insists that this matter be heard in the Tax Court.

The discovery rules in the Tax Court are the most restrictive. They do not allow depositions of parties or witnesses except in rare instances.[2] These

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[2] *See* Tax Court Rules 74(a), 75, 80 and 81. *See also* Saltzman, *IRS Practice & Procedure*, 9-31, 9-32 (2d Ed. 1991); Burnett & Kafka, *Litigation of Federal Tax Controversies*, Chapter 1 and Chapter 7 (1991). *See also De Lucia v. Commissioner*, 87 T.C. 804 (1986) and *Estate of Haber v. Commissioner*, 91 T.C. 236 (1988). Both Saltzman and Kafka, in their respect works, list a number of differences in the respective forums some of which do not pertain to this litigation. Among those of some

depositions are essential to the success of the taxpayers in cases, such as this one, wherein the promoter and general partners are unfriendly and have interests adverse to those of the Petitioners and are in possession of the facts of the case. In this case, the Government investigated the facts over several years and criminally prosecuted the promoters and general partners in these partnerships. They know the facts and have seen the documents. The promoters and the various general partners have seen the documents and they are in possession of the facts. The Petitioners have not seen the documents

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importance are: 1) increased deficiency (In the Tax Court, as opposed to the other forums, the Commissioner may seek an increased deficiency); and 2) precedent (By filing in the Tax Court where a particular partner resides the entire partnership may be prey under the *Golsen* rule to an unfavorable result). *See Golsen v. Commissioner*, 54 T.C. 742 (1970) *aff'd* 445 F.2d 985 (10th Cir. 1971) *cert. denied* 404 U.S. 940 (1971).

and have not interviewed the witnesses. In the Tax Court, they will not get this opportunity until the trial itself.

Besides the discovery differences, the types of trials are different in the various forums. In both the Tax Court and the Court of Federal Claims, the trial is before a judge. In the district court, on the other hand, a jury trial may be had.

A third difference is that both the district court and the Court of Federal Claims have equitable powers, whereas the Tax Court ostensibly has none.[3] Thus, the power to provide an equitable result or reform a contract (powers which could be important in a case such as this one)

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[3] Saltzman, *supra* at 9-31 ("The Tax Court does not recognize an equitable nature because it technically does not have equity jurisdiction.") *See also Continental Equities, Inc. v. Commissioner*, 551 F.2d 74 (5th Cir. 1977); *Taylor v. Commissioner*, 258 F.2d 89 (2d Cir. 1985); *Phillips Petroleum Co. v. Commissioner*, 92 T.C. 55 (1989).

would not be available in the Tax Court.

A second right of the TMP is that even if another partner designates the partnership's forum as the petitioning party, the TMP has the right to intervene in the action and assume the rights and responsibilities given to the TMP per the court's jurisdiction. IRC §6226(b)(5).

A third right granted to the TMP is that if the litigation is before the Tax Court, the TMP is given duties and responsibilities which extend far beyond those given under TEFRA, including a broad settlement authority. Tax Court Rule 248.

Lastly, only the TMP, notice partners and five percent (5%) groups can seek review of a court determination. IRC §6226(g). Therefore, during the judicial phase, the TMP has rights and duties not available to the other partners, and therefore, has greater and often deciding

control over the other partners' fate with respect to the proposed adjustments set forth in the FPAA.

C. Internal Revenue Service Procedural Guidelines And Rules Regarding §6231(a)(7).

Code §6231(a)(7) merely describes how a TMP is chosen not when. It is not expressly limited to the administrative stage of a proceeding but clearly it is not expressly stated to include the judicial stage. If anything the language of the statute, the regulations, the IRS' own rulings and the cases make it clear that from a legal and practical point of view §6231(a)(7) should not apply during the judicial stage of a TEFRA proceeding.

IRS procedural guidelines and rules dealing with IRC §6231(a)(7) indicate that it is only applicable during the administrative stage of a TEFRA proceeding. Revenue Procedure 88-16,

1988-2 C.B. 691, describes both the circumstances under which the IRS will select a TMP for a partnership pursuant to §6231(a)(7) and the criteria the Service will consider in its selection. Rev. Proc. 88-16 provides as follows:

> . . . under the unified proceedings, the TMP is the general partner designated by the partnership to represent the partnership before the Service in all tax matters for a specific taxable year.

Rev. Proc. 88-16 at §2.03 (emphasis added).

This language in Rev. Proc. 88-16 indicates that the TMP created by §6231(a)(7) is to be a liaison between the IRS and the partnership. As set forth in Section "II.A.1." above, the administrative stage of a TEFRA proceeding occurs between the time the NBAP is issued and the FPAA is issued. Once the FPAA is issued, the partnership is no longer under audit by the Service

for the years designated in the FPAA. Therefore, as the purpose of §6231(a)(7) is to set forth the criteria for the selection of a TMP when the partnership is before the Service, §6231(a)(7) should not be applicable subsequent to the issuance of the FPAA.

That the role of the TMP created by §6231(a)(7) is to represent the partnership before the IRS has also been expressed by the Tax Court. *See Seneca Ltd. v. Commissioner*, 92 T.C. 363 (1989) *aff'd without published opinion* 899 F.2d (9th Cir. 1990). In discussing the power that Congress granted to the Service to appoint a TMP via §6231(a)(7), the Tax Court held:

> Respondent (The Service) . . . has a public duty to assure the fairness of the partnership's administrative proceedings. The power to appoint a TMP is given to respondent in order to assist him in carrying out his administrative responsibility in partnership proceedings.

Seneca, *supra* at 367. (emphasis added). Once the Revenue Agent issues the FPAA to the partnership, the agent's administrative responsibility in the TEFRA proceeding has ended as the partnership will either seek to litigate the proposed adjustments before the jurisdiction of a court, or the partnership will do nothing, allowing assessment of the tax. Accordingly, one can infer from the opinion in *Seneca* that §6231(a)(7) is only applicable during the administrative stage of the TEFRA proceeding as the IRS agent has no administrative responsibility after such time.

Under the reasoning of Rev. Proc. 88-16 and *Seneca*, once the FPAA has been issued, the IRS agent has no need to appoint a TMP as his responsibilities at that point have been discharged and he or she is no longer in need of a liaison

between himself or herself and the partnership. If the Service therefore has no duty or incentive to appoint a TMP for a partnership once the FPAA has been issued, it is possible under the statutory scheme of §6231(a)(7) for a partnership to be unable to appoint a TMP, and thereby left without one. Pursuant to §6231(a)(7), a partnership with only limited partners will be unable to appoint a TMP itself.[4] If Congress intended §6231(a)(7) to be applicable subsequent to the time an FPAA was issued to the partnership, it is doubtful they would have left this gaping hole which leaves a partnership high and dry without a TMP.

Therefore, both Rev. Proc. 88-16 and *Seneca* give credence to the theory that

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[4] The services own regulations may questionably allow a limited partner to be a TMP. Temp. Reg. §301.6231(a)(7)-1T(f). However, if §6231(a)(7) applies, this regulation may violate the statute.

§6231(a)(7) should no longer be applicable subsequent to the issuance of an FPAA. At that point, the Service has no use for the partnership's TMP and the TMP is solely the partnership's facilitator, who can carry out the directives of the majority of the partners. Subsequent to the issuance of the FPAA, it is clear that the TMP has no duties and responsibilities other than to the partnership, and therefore, the partnership should be able to designate the TMP of its choice, regardless of whether said TMP meets the requirements of §6231(a)(7).

D. Prior Tax Court Cases.

In several Tax Court cases, the Tax Court has demonstrated that it believes different rules apply with respect to TMP designations in the judicial stage of a TEFRA proceeding. The Tax Court has

expressly overruled §6231(a)(7) in the judicial stage of a TEFRA proceeding and has held that the temporary regulations promulgated under §6231(a)(7) have little, if any, applicability during the judicial stage.

In *Computer Program II*, the Tax Court held that it has the right to appoint a limited partner to serve as the TMP, even though such authority is not granted to it under IRC §6231(a)(7). *Computer Program II*, *supra* at 1127. In *Computer Program II*, the partnership had no general partners who were eligible to serve as the TMP, and the Service, pursuant to its statutory power under §6231(a)(7), had not selected a limited partner to act as TMP. Accordingly, as §6231(a)(7) left the partnership without a TMP, the Tax Court disregarded §6231(a)(7) and appointed a limited partner as the partnership's TMP. More

specifically, the Court directed the limited partners to make the designation among themselves, and if they failed to do so, the Court would make the designation. *See Computer Programs I, supra* at 206, n.9.

The Tax Court noted that this Court appointment was necessary in order to assure: 1) the fair, efficient and consistent disposition of partnership litigation and 2) that all partners interested in the outcome of the partnership proceeding would receive sufficient information concerning the litigation to allow them to protect their interests. *Computer Programs II, supra* at 1126 - 1127. The Tax Court elaborated on the importance of a TMP's role during the judicial stage of the TEFRA proceeding as follows:

> The presence of a tax matters partner during litigation is essential to the operation of the statutory procedures of §6221 et.

> seq., and to the fair, efficient, and consistent disposition of partnership proceedings before us. The TMP's initiative during the proceeding as well as the execution of his statutory duties will have a substantial effect upon the rights of all partners in the partnership. [*Computer Programs I*], *supra* at 206; §301.6223(g)-1T, Temp. Proc. & Admin. Reg. 52 Fed. Reg. 6785-6786 (March 5, 1987).

Computer Programs II, *supra* at 1126(emphasis added). The holding in *Computer Program II* was followed on substantially similar facts in a later Tax Court case, *September Partners, Ltd. v. Commissioner*, 58 T.C.M. (CCH) 1244 (1990).

The Government has argued and the Court of Claims agreed that *Computer Program II* is unpersuasive with respect to the taxpayers' designation of a "general partner to a limited extent" as TMP because in *Computer Program II*, a valid petition was already before the Tax Court when the Court made its designation. However, this argument

fails to glean the significance of *Computer Program II's* holding.

In *Computer Program II*, the Tax Court overrode §6231(a)(7) by allowing the partnership to appoint a limited partner as a TMP. Under the express language of §6231(a)(7), only the Service is granted the authority to appoint a limited partner as TMP. However, as the mechanisms and requirements set forth in §6231(a)(7) left the partnership in *Computer Program II* without a TMP, the Court determined it necessary to disregard §6231(a)(7) as it found that it was critical to have a TMP during the judicial stage of a TEFRA proceeding. Accordingly, contrary to the Government's argument, it is irrelevant that a valid petition was before the Court at the time the designation took place. Rather, what is relevant, is that the Tax Court overrode the express requirement of

§6231(a)(7). There is no special exception within §6231(a)(7) for a case validly petitioned to the Tax Court. It either applies or it does not. The Tax Court held it does not. The Tax Court found §6231(a)(7) inadequate as it had the capacity to leave a partnership without a TMP during the critical judicial stage of a TEFRA proceeding, and determined that therefore, §6231(a)(7) should not be applicable during the judicial stage.

As illustrated the judicial stage of the TEFRA proceeding commences when the FPAA is issued to the partnership, not when a petition is filed with the Court. Once the FPAA is issued, the partnership either accepts the adjustments set forth therein, or the partnership disagrees with the proposed adjustments and begins to formulate its litigation posture and strategy.

Accordingly, per *Computer Program II*, section 6321(a)(7) should not apply once an FPAA has been issued to the partnership as that is when the judicial stage commences and the presence of a TMP becomes a necessity. The Tax Court overrode §6231(a)(7) because it had the capacity to leave a partnership without a TMP during the judicial stage of a TEFRA proceeding. Accordingly, as litigation commences once an FPAA is issued, §6231(a)(7) should either control during the judicial stage or it should not. Whether or not a petition has been filed is irrelevant.

In another recent case, *Chomp Associates v. Commissioner*, 91 T.C. 1069 (1988), the Tax Court followed its reasoning in *Computer Program II* and held that the temporary regulations promulgated under §6231(a)(7) carry little weight, if any, in determining

whether a TMP is qualified to represent a partnership during the judicial phase of the TEFRA proceeding. In *Chomp Associates*, the Court held as follows:

> Jusidictionally, we believe that the temporary administrative regulations do not play a significant role, if any, regarding whether [a partner] had the authority to file a petition. The more obvious purpose of respondent's regulations is to provide respondent with the name and address of the TMP to be able to properly mail an FPAA.

Chomp Associates, supra at 1078. (emphasis added).

In fact, the express provisions of the §6231(a)(7) temporary regulations bolster the Tax Court's finding that the regulations were not intended to govern during the judicial stage of a TEFRA proceeding. Under Temporary Regulation §301.6231(a)(7)-1T(k), the Service states that it "is not required to give effect to (a) designation [of a TMP] . . . until thirty (30) days after the statement [so

indicating] is filed." Temp. Reg. §301.6231(a)(7)-1T(k)(emphasis added). If applied for purposes of determining jurisdiction, this provision could shorten the statutory period in which a new TMP could file a petition for redetermination. A petition and designation of a new TMP filed more than sixty (60) days after issuance of the FPAA would be subject to jurisdictional challenge at the whim of the Service, who could give effect to the designation sooner, but might not. Therefore, like statutory §6231(a)(7), the temporary regulations promulgated thereunder are defective when applied in the judicial stage of a TEFRA proceeding. The Tax Court aptly recognized the regulations' deficiencies and held they should have little, if any, applicability during the judicial stage of a TEFRA proceeding.

Accordingly, per the holdings in

Computer Program II, *September Partners* and *Chomp Associates*, the Tax Court has clearly indicated that it does not believe §6231(a)(7) and the temporary regulations promulgated thereunder should control once a partnership is in the judicial stage of a TEFRA proceeding. This Court likewise should follow Tax Court precedent. The Tax Court is either right or wrong.[5] Section 6231(a)(7) and the temporary regulations thereunder either apply or they do not during the judicial stage. This Court must decide.

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[5] We emphasize that to fashion acute distinctions between the applicability of §6231(a)(7) when there is a valid petition vs. an invalid petition is fallacious. Section 6231(a)(7) makes no such distinction. The only distinction which can be garnered from §6231(a)(7) is that its applicability is to be limited to administrative proceedings.

E. Denial Of Due Process.

Section 6231(a)(7) and the temporary regulations thereunder have the ability to offend a taxpayer's Constitutional rights if they are applicable and controlling once an FPAA has been issued to a partnership (the judicial stage).

Per the express provisions of §6231(a)(7) and the temporary regulations adopted thereunder, if a partnership has no general partners who are eligible to serve as TMPs, the IRS, and only the IRS, has the authority to designate a limited partner as TMP. IRC §6231(a)(7). Nevertheless, this designation is not mandatory. The Tax Court has held that the appointment of a TMP by the Service pursuant to §6231(a)(7) is not mandatory provided there will be no prejudice to the rights of the partners due to the lack of a TMP. *Seneca, supra* at 367. Therefore, pursuant to §6231(a)(7), only

the Service can appoint a limited partner as TMP, and the Service need only make such appointment if a failure to do so would prejudice the rights of the partners in the partnership.

Assuming §6231(a)(7) and the regulations thereunder are applicable during the judicial stage of the TEFRA proceeding; then, if a partnership has no general partners eligible to serve as TMP at the time the FPAA is issued, the Service can either appoint a limited partner to act as TMP, or it can refuse to appoint, and leave the partnership without a TMP.[6] In either event, the partners' Constitutional rights are impaired. The Service, the partnership's adversary, is either allowed to designate its opponent's representative or worse

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[6] As pointed out in Section II.C. herein, the Service has no responsibility or incentive to appoint a TMP once the administrative stage of a TEFRA proceeding has ended. *See Seneca, supra*.

yet, the Service is allowed to leave its opponent without a representative. To allow the Service such latitude during the judicial stage of a TEFRA proceeding offends all traditional notions of fair play and justice.

The following examples illustrate how the application of §6231(a)(7) and the regulation thereunder to the judicial phase of a TEFRA proceeding can result in a very real denial of due process:

Example No. 1

Suppose there is a partnership ABC Ltd. Partnership. A and B Co. are the general partners. C is the only limited partner. A and B Co. are ineligible to be the TMP as A was prosecuted criminally and B Co. has filed bankruptcy. C believing it must be the TMP by virtue of being the only partner left files in the Court of Federal Claims within 90 days after receiving the FPAA. The government moves to dismiss for lack of jurisdiction and the motion is granted. Under §7422(h) C may not thereafter pay the tax and litigate the merits of its case. C is thus deprived of a forum to litigate the

issues.

As a variation assume that A not wishing to participate in any further litigation calls C after the FPAA is issued and offers to designate C as TMP. C accepts and files a petition as TMP within 90 days of the FPAA. The petition so filed is subject to dismissal under the Government's interpretation of §6231(a)(7).

Example No. 2

Assume A and B Co. are the general partners and C and D are the limited partners in ABCD Ltd. Partnership. A is the TMP and has the largest profits interest. Sixty days after the FPAA is issued A designates B Co. as TMP and B Co. files the petition in the Court of Federal Claims. Under Temp. Reg. §301.6231(a)(7)-1T(k), the designation of B Co. is ineffective and the petition should be dismissed for lack of jurisdiction.

As a variation of this example assume A dies 60 days after the FPAA is issued and B Co. as the only remaining general partner files the petition within the 90 day period reserved for the TMP to file a petition. B Co. was not a general partner for the year under audit. Once again the petition could be subject to dismissal if §6231(a)(7) and the regulations are applicable.

In each of these examples the partnership would have no forum to contest the Government's increase in their tax liabilities. Code §7422(h) makes this clear. There are no exceptions for inequitable circumstances. This inability to contest a claim is the hallmark of a denial of due process. All of the partners in the above examples would be required to pay the asserted tax, penalties and interest and never be able to litigate whether the tax was in fact correct.

As previously discussed, it is critical to the partnership's fate with respect to the proposed adjustments set forth in the FPAA that the partnership have a responsible, competent and active TMP at all times during the judicial stage of the TEFRA preceding. Moreover, as pointed out earlier, during the judicial stage, the TMP has many rights

and responsibilities not available to the other partners. Therefore, during the judicial stage, it is important that the partnership's TMP be a take-charge leader who best represents the collective interests of the partners. Accordingly, during this judicial stage, the partnership should not be left without a TMP as §6231(a)(7) seemingly allows, nor should the IRS, the partnership's adversary be permitted to designate the partnership's leader as §6231(a)(7) seemingly allows.

Simply put, §6231(a)(7) and the regulations thereunder, leave the partners wide open to abuse and infringement of their Constitutional rights if they are applicable during the judicial phase. For example, the IRS could appoint shortly before or after the FPAA is issued an incompetent, indifferent, one percent limited partner

as TMP. Such an appointment could, if not would, prove detrimental to the partnership's chances at trial. Can there be any doubt as to who would be more conscientious or vigorous in the partnership litigation - a partner who has a $100 interest in the outcome or a partner who has a $500,000 interest in the outcome. Similarly, can there be any doubt as to which of these the Government would prefer as an opponent.

In the alternative, the IRS could choose to not appoint. In the case of no appointment, the partnership is denied a representative who can take advantage of the exclusive ninety (90) day filing period given to the TMP under §6226. This could, as here, deny the majority of the partners the forum of their choice. Moreover, in the case of no appointment, the partnership is left without a leader who can organize the partners and prepare

a coordinated and decisive litigation strategy.

The Tax Court recognized the inherent prejudice of the application of §6231(a)(7) in the judicial stage of the TEFRA proceeding. In *Computer Program II*, the Court held as follows:

> Where a partnership is without a TMP before this Court, we believe it is more appropriate for the Court to appoint the partnership TMP, rather than for respondent to make the appointment because respondent is the partnership's adversary during the litigation. An adversary should not appoint an opponent's representative.

Computer Program II, *supra* at 1127 - 1128.

Accordingly, §6231(a)(7) should not be applicable once an FPAA has been issued to the partnership as it has the potential to deny the partnership the right to a trial before a fair and impartial tribunal of its choice. Section 6231(a)(7) gives the Service a powerful weapon against the partnership,

its adversary, as it allows the Service to straddle the partnership with an incompetent, unmotivated or indifferent leader; to quash the partnership's ability to obtain its forum of choice and to hinder the partnership's effectiveness in organizing a cohesive and decisive litigation strategy. Therefore, as §6231(a)(7) transgresses upon the partner's Constitutional rights by denying it a full, fair and impartial hearing, a partnership should not be bound by the limitations set forth in §6231(a)(7) with respect to the selection and designation of a TMP once it has received an FPAA.

In conclusion, §6231(a)(7) and the temporary regulations thereunder should not be applicable once an FPAA has been issued to a partnership. Therefore, as the partnerships appointed petitioners as TMPs subsequent to their receipt of the

FPAAs, the Claims Court, the Court of Appeals for the Federal Circuit and the Government are in error in seeking to dismiss the taxpayers' petitions for lack of jurisdiction on the grounds that the TMPs who filed said petitions do not meet the standards set forth in §6231(a)(7).

III. EITHER ADAMS OR THE PARTNERSHIP SHOULD BE ALLOWED TO RATIFY THE PETITIONS FILED BY CRESTWOOD, DOBBINS AND BURR.

Should this Court determine that IRC §6231(a)(7) and the regulations thereunder are applicable even after the FPAA has been issued, and that pursuant thereto, Petitioners cannot qualify as the partnerships' TMPs, then Adams, the partnerships' previous TMP, should be allowed to ratify the petitions filed by Petitioners. Both the Tax Court and the

Court of Federal Claims[7] allow an imperfect petition to be cured by the filing of an amended petition provided evidence exists that the original signatory was duly authorized to file the petition on behalf of the non-signing party. *See Montana Sapphire Associates v. Commissioner*, 95 T.C. 477 (1990); CT.

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[7] Rule 17(a) of the Court of Federal Claims states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objections for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

CT. FED. CL. R. 17(a). The rules further hold that although only certain amendments to the complaint may be had by written consent of the adverse party or by leave of the court, that such leave "shall be freely given when justice so requires." CT. FED. CL. R. 15(a); *see also Construction Equipment Lease Co. v. U.S.*, 17 Cl. Ct. 628, 630 (1989).

FED. CL. R. 17(a). The Government has argued previously that the taxpayers cannot qualify for ratification as Petitioners were not duly authorized by the partnership as the TMPs, at the time the petition was filed. The Court of Federal Claims and the Court of Appeals for the Federal Circuit accepted this argument. Nevertheless, the Tax Court very recently held that the principal of implied ratification can be applied in a TEFRA proceeding. *Mishawaka Properties Co. v. Commissioner*, 100 T.C. 353 (1993). Under *Mishawaka*, it is not necessary that a TMP be duly authorized by the partnership at the time the petition is filed, provided the petition is subsequently ratified via the conduct of either the partners who were qualified to be the TMP or by a majority of the partners who could have designated a TMP. *Mishawaka, supra* at 365. In *Mishawaka*,

as here, the petition was filed within the 90 day period following the FPAA by someone who was determined not to be the TMP. Thus, quite clearly the Tax Court had no jurisdiction to hear the case unless the petition so filed could be said to have been subsequently ratified. Notably it was the Government in *Mishawaka* who was arguing for ratification. Here the sides are reversed but the principle decided by the Tax Court remains the same and should be applied in this case.

In any event, the taxpayers herein can qualify for ratification, as the evidence indicates that there was express authorization for Petitioners' filing prior to the time of said filing, as well as express ratification thereafter. On January 30, 1989, prior to the date the petitions were filed, Crestwood, Burr and Dobbins agreed to be designated as

"general partners for the limited purpose of serving as TMP." Petitioners were duly authorized to file the petitions at the time they were filed.

Moreover, there is conclusive evidence that both Adams and the majority of the limited partners ratified Petitioners status as TMPs and the filing of the petitions subsequent to the filing thereof. On February 12, 1990, Adams executed a "Resignation of Tax Matters Partner and Appointment of New Tax Matters Partner." Subsequent to February 12, 1990, limited partners representing percentages ranging from forty percent (40%) to eighty-seven (87%) of the total interests in the partnerships signed documents consenting to Petitioners' appointments. Accordingly, subsequent conduct and written documents by Adams, as well as the limited partners, indicate that Adams and the limited partners

ratified Petitioners' appointment as TMPs and their filing of the petitions herein. Therefore, under the holdings of *Montana Sapphire* and *Mishawaka*, Adams or the partnership must be permitted to file an amended petition. *Cf. Kraasch v. Commissioner*, 70 T.C. 623 (1978)(involving implied ratification in a non-TEFRA case.)

Additionally, in the present cases, as in *Construction Equipment Lease Co.*, the Petitioners had a reasonable belief that either they were the TMPs for the partnerships or that Adams gave them authority to file the petitions. The IRS is unable to demonstrate such circumstance as would warrant the court not granting Petitioners the right to make an amendment to their petitions. *See Construction Equipment Lease Co., supra* at 630.

The IRS has argued previously that IRC

"general partners for the limited purpose of serving as TMP." Petitioners were duly authorized to file the petitions at the time they were filed.

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ratified Petitioners' appointment as TMPs and their filing of the petitions herein. Therefore, under the holdings of *Montana Sapphire* and *Mishawaka*, Adams or the partnership must be permitted to file an amended petition. *Cf. Kraasch v. Commissioner*, 70 T.C. 623 (1978)(involving implied ratification in a non-TEFRA case.)

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The IRS has argued previously that IRC

6226(e) makes it impossible for Adams to ratify this petition because Petitioners did not deposit with the court the amount by which Adams tax liability would have increased if the partnership items were removed from his return as adjusted by the FPAA. This argument fails, however, since Adams, because of his settlement agreement, would not owe any additional taxes. Therefore, if Adams were still the TMP at the time the petitions were filed, he should be allowed to ratify those petitions.

Alternatively, it is established as a matter of tax law that "A" may properly pay or make a deposit of taxes owed by "B."[8] Further, it is clear that under

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[8] *See Stahmann v. Vidal*, 305 U.S. 61 (1938); *Cindy's Inc. v. U.S.*, 740 F.2d 851 (11th Cir. 1984); *Collins v. U.S.*, 532 F.2d 1344 (Cl. Ct. 1976). *See also* Burnett & Kafka, *supra* at §11.07. There is a controversy over who may properly file a refund claim under §§6402 and 6511 when a third party pays the taxes. However, in this instance, this is not a

the TEFRA procedures if a good faith deposit of the taxes is made which deposit proves to be less than the amount due under the FPAA the petition will not be dismissed but rather the court will require the correct deposit to be made. IRC §6226(e)(1). Hence, in this instance, the deposits made in each instance could be designated by the Petitioners as deposits on behalf of Adams and the court could make a determination of whether the deposits were adequate and as appropriate order the amounts increased.

For these reasons, Adams or the partnership should be allowed to ratify the petitions. By so doing, the partnership would be allowed to determine the forum which would best suit its needs.

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refund suit and is not governed by §§6402 and 6511.

IV. CONCLUSION

For the foregoing reasons,

Petitioners' petition for writ of certiorari should be granted.

Respectfully submitted.

Arthur H. Boelter
Counsel of Record
BOELTER & GALE
1001 Fourth Avenue
Suite 4111
Seattle, WA 98154
(206) 587-0000

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